United States Court of Appeals

for the Second Circuit

APPENDIX

75-7669

To be argued by
VICTOR A. KOVNER

In The

United States Court of Appeals

For The Second Circuit

WEITNAUER TRADING COMPANY, LTD.,

Plaintiff-Judgment Creditor-Appellee,

- against -

MORTON L. ANNIS,

Defendant-Judgment Debtor-Appellant.

Appeal from a Contempt Order of the United States District Court for the Southern District of New York

BRIEF AND APPENDIX FOR PLAINTIFF-JUDGMENT CREDITOR-APPELLEE

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UNITED STATES COURT OF APPEALS
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WEITNAUER TRADING COMPANY, LTD.,

Plaintiff-Judgment
Creditor-Appellee,

Docket No. 75-7669

-against-

MORTON L. ANNIS,

Defendant-Judgment
Debtor-Appellant.

BRIEF FOR PLAINTIFF-JUDGMENT CREDITOR-APPELLEE
Re: Appeal From Contempt Order

Preliminary Statement

This brief is submitted on behalf of Weitnauer Trading Company, Ltd. ("Weitnauer"), the plaintiff-judgment creditor below and appellee on this appeal taken by Morton L. Annis ("Annis"), the defendant-judgment debtor. The appeal is from an order of the District Court for the Southern District of New York, filed on December 18, 1975, adjudging Annis in contempt of court (the "Contempt Order") as a result of his wilful failure and refusal to comply with an order of that court, signed and entered October 30, 1975, directing Annis to make certain installment payments in satisfaction of an outstanding judgment (the "Installment Payment Order").

This appeal from the Contempt Order has been consolidated for argument with Annis' appeal from the Installment Payment Order pursuant to stipulation by counsel for both parties which was approved and "So Ordered" by the Honorable Walter R. Mansfield. Both appeals (as a result of that "So Ordered" stipulation) are being heard on an expedited basis pursuant to this Court's order of December 11, 1975 (DSA 87)*. Because the facts - and to an extent the legal issues - overlap from one appeal to the other, Weitnauer respectfully advises the Court that this brief will make references to its earlier brief as well as to both briefs filed on behalf of the appellant**.

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* All references to the Supplemental Appendix compiled in connection with this appeal from the Contempt Order are designated (DSA) and all references to the original Appendix compiled in connection with the appeal from the Installment Payment Order are designated (A).

** References to Weitnauer's brief filed with respect to the appeal from the Installment Payment Order will be referred to as (Weitnauer brief at); references to appellant's brief for the appeal from the Installment Payment Order will be referred to as (1 Annis brief at) and references to appellant's brief on the appeal from the Contempt Order will be referred to as (2 Annis brief at).

STATEMENT OF ISSUES ON APPEAL

(1) Does the decision in Vail v. Quinlan*, deprive the District Court of authority to enforce the Installment Payment Order by contempt proceedings? Weitnauer submits that the Contempt Order was validly issued pursuant to New York law, federal rule, federal statute and the inherent power of the federal courts.

(2) Did the procedure pursuant to which Annis was adjudicated in contempt of District Court satisfy due process requirements? The District Court held that it did and Weitnauer submits that finding was proper and, accordingly, not violative of any applicable due process requirement, including those set forth in Vail v. Quinlan.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

As background, Weitnauer respectfully refers the Court to the "Statement of Facts and Prior Proceedings" in its brief on the companion appeal (Weitnauer Brief at 3-6). The Installment Payment Order was signed and entered on October 30,

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* _____ F. Supp. _____ (SDNY, Jan. 7, 1976) (Three Judge Ct) Opinion No. 43761 is annexed at the conclusion of this brief for convenience.

1975, following a ten (10) day notice of settlement period during which counsel for both parties served and filed proposed orders and supporting (and/or opposing) affidavits (A330-343). Annis served and filed a Notice of Appeal to this Court from the Installment Payment Order on or about November 21, 1975 (A344). No stay or other interim relief from the District Court was sought prior to or at the time of noticing that appeal.

At or about the time the Notice of Appeal was filed, Victor A. Kovner, counsel to Weitnauer learned from counsel for General Cigar Co. Inc. ("General Cigar") that the sum of $26,041.67 previously held by it already had been released for payment to Annis and that Annis also was and would continue to be receiving the monthly payments provided by his agreement with General Cigar. (DSA 7) These facts were substantially confirmed by Leslie D. Corwin, counsel to Annis, by telephone. During that conversation in late November:

> "[Mr. Kovner] advised [Mr. Corwin] that the Defendant's failure to comply with the [Installment Payment] Order would compel [his] firm to seek an order of contempt against the Defendant, unless [he] could be assured that the monies past due would be forthcoming and that the Defendant would comply with the [Installment Payment] Order. Mr. Corwin advised [Mr. Kovner] that he could give no such assurances. He advanced no excuse, explanation or justification for the Defendant's failure to comply with [the Installment Payment] Order." (DSA 9).

Faced with Annis' failure to make payments due as of October 31, November 1 and December 1, 1975, his receipt of funds out of which those past due installments were ordered to have been made, the absence of a stay - or even an attempt to obtain one - and his counsel's inability to justify such behavior and assure future compliance, Weitnauer instituted the contempt proceedings now challenged upon this appeal.

The proceeding was instituted by an "ORDER TO SHOW CAUSE TO ADJUDGE DEFENDANT IN CONTEMPT" pursuant to Local Civil Rule 14 (DSA 3-4) and a supporting affidavit of Victor A. Kovner, Esq., sworn to December 3, 1975. (DSA 5-10). The affidavit recited Annis' failure to make payments, his receipt of monies and the prior telephone notice to his counsel that enforcement by contempt would be sought. The order to show cause stated that the relief sought was an order "adjudging the said Morton L. Annis in contempt of this court to be dealt with accordingly" (DSA 3) and the supporting affidavit specifically requested that Annis "be held in contempt of this Court to be dealt with accordingly, that an order issue for his commitment pending compliance with the [Installment Payment] Order . . . " (DSA 9).

The order to show cause was signed by Judge Carter on December 3, 1975 and was personally served that same day on Annis' counsel. The affidavits of Norton I. Katz and Leslie D. Corwin of that same date were filed to correct certain statements about their own personal (and their firm's) statements and actions following the entry of the Installment Payment Order. (DSA 13-17) Nothing in those affidavits in any way placed into issue Annis' wilful violation of the Installment Payment Order, or any of the elements of his demonstrably contumacious behavior. To the contrary, the Exhibits to those affidavits (DSA 18-20) provided yet further evidence that Annis had received substantial monies from General Cigar - in sufficient amount to have made the payments ordered.

Not until the return date of the contempt motion, December 9 (six days following personal service upon defendant's counsel of the order to show cause) did Annis come forward with any request for interim relief from or a modification of the Installment Payment Order. Even then no new facts were presented to the District Court. A comparison of the moving affidavit of Leslie D. Corwin of December 8 (DSA 23-38) with the District Court opinion of October 6 on which the Installment Payment

Order was based (A 307-328) demonstrates that every factual issue and legal argument raised in the motion to stay or modify already had been advanced by Annis and, further, already had been considered by the District Court in its opinion.

Neither in the defendant's motion papers nor in the course of the oral argument before Judge Carter on December 9 was there any refutation of the underlying facts of the contempt, i.e., Annis' receipt of the monies and Annis' failure to make the payments ordered and past due. In effect, in lieu of contesting the facts of the contempt, Annis at that time sought reargument of the underlying motion. Yet he presented no new facts and hence nothing to warrant a reconsideration of the District Court's decision and order. Accordingly, Judge Carter denied the cross-motions and found Annis in contempt (DSA 40, 100-104).

Then, as outlined in appellant's brief on this appeal (2 Annis Brief at 6-10), a series of six separate applications for interim relief to the District Court and to this Court followed. The first application was made to this Court on December 9, 1975 and a full panel of Circuit Judges heard argument on December 11, 1975. The papers filed with this Court in connection with that application are contained in the

supplemental appendix (DSA 43-67). After argument, this Court did grant interim relief to Annis by ordering a stay of the Installment Payment Order pending determination of the appeal on the condition, inter alia, that a supersedeas bond in the amount of $50,000 be filed on or before December 15, 1975.

During oral argument counsel for Weitnauer represented to this Court that so long as an interim stay from the Installment Payment Order was in effect, no effort would be made to pursue the contempt proceedings. Accordingly, subsequent to the argument and this Court's grant of conditional relief, Weitnauer's counsel withdrew the contempt order that had been noticed for settlement later in the day on December 11.

When advised three days later that Annis would fail to file the bond and meet the condition of the stay, Weitnauer's counsel noticed a revised order of contempt for settlement before Judge Carter on December 16.

Immediately thereafter, Annis' counsel again applied, ex parte, for additional relief from this Court requesting that the requirement of the supersedeas bond be waived - in effect that this Court modify its earlier order. That motion was denied by this Court on December 16, 1975. (DSA 99).

Although the revised contempt order was noticed for settlement before Judge Carter on December 16, the District Court sought assurances from counsel for both parties and the Clerk of the Circuit Court that there was no impediment to signing the contempt order. Accordingly, during the period of December 16 through December 18, counsel for both parties conferred with Judge Carter's chambers and, although, not contained in the record, the contents of the proposed contempt order was discussed by the District Court, with both counsel present in Judge Carter's chambers. The Contempt Order ultimately signed (DSA 100-104) included a combination of terms contained in Weitnauer's proposed order, Annis' proposed counter-order (DSA 104-107) as well as matters requested by the District Court itself (DSA 119).

Upon the signing of the Contempt Order on the afternoon of December 18, 1975, Annis formally applied to the District Court for interim relief in the form of a stay of its execution. Argument upon that motion was heard in chambers with counsel for both parties present and the proceedings were transcribed (DSA 118-124). In support of that application, Annis filed a notice of motion and a supporting affidavit (DSA 108-116).

Upon denial of that motion in Chambers, Annis again applied to this Court for relief. That third request was denied by this Court in an order of January 8, 1976, which is annexed to the back of Annis' Brief on this appeal. In addition to denying the stay, this Court awarded costs to be paid to Weitnauer and it enjoined Annis (and his attorney) from filing a further motion for a stay or other similar relief in this Court.

Though not part of the record, the Court should be advised that on January 9, 1976, the day following the denial of Annis' sixth motion for interim relief, Annis instituted a proceeding in the United States District Court for the Middle District of Florida against the United States Marshal to restrain the enforcement of the Contempt Order. The sole ground asserted was that FRCP Rule 4(f) did not permit enforcement of a civil commitment order beyond 100 miles of the District Court issuing the order, notwithstanding the apparent authority for such enforcement found in New York's long-arm statute, available under FRCP Rule 4(e) and the first sentence of Rule 4(f).*

This proceeding was instituted without notice to the plaintiff, who was known by Annis to have engaged Florida

*See, e.g., Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d 250 (2d Cir. 1968).

counsel in connection with the post-judgment proceedings. On January 12, 1976, after Weitnauer's counsel learned of this proceeding by accident, Judge Hodges of the District Court in Tampa denied Annis' motion for a restraining order against the United States Marshal. Judge Hodges did indicate, however, that in the event a habeas corpus proceeding was instituted, he would be inclined to adopt Annis' restrictive construction of Rule 4(f). On January 13, 1976, Annis surrendered himself to the U.S. Marshal, and simultaneously instituted a habeas corpus proceeding. On the same day, he was released upon posting a $1,000 bond*, delivery of his passport to the U.S. Marshal, and his agreement to remain within the Middle District of Florida pending the determination of the habeas corpus proceeding.

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* Apparently, among the reasons the conditions of his release were so modest was the extensive and undisputed statement of his long tenure in the Tampa area, including his family, social and business stature, He informed the Magistrate that he was Chairman of the Board of Master Packaging, Inc. (a large manufacturing company in Tampa) and former President of the Gradiaz Annis division of General Cigar, by which he is employed in Tampa.

POINT I

THE DISTRICT COURT COULD ENFORCE ITS OWN ORDER BY CONTEMPT PROCEEDINGS, PURSUANT TO AUTHORITY FOUND IN (a) CPLR 5210, 5226 AND 5251, (b) RULE 14 OF THE CIVIL RULES OF THE SOUTHERN AND EASTERN DISTRICTS, (c) 18 U.S.C. § 401(3) AND (d) ITS INHERENT POWER.

Annis contends that the decision of a three-judge court of the Southern District in Vail v. Quinlan, supra, in which seven sections of Article 19 of the New York Judiciary Law were held unconstitutional, requires reversal of the Contempt Order (2 Annis Brief, Point I). Aside from the fact that the well-reasoned opinion in Vail is not binding upon this Court, and that, as set forth in Point II below, all of the Vail standards of due process were fully satisfied by the proceedings in this record, the sections stricken in Vail did not provide the authority for the issuance of the Contempt Order here. To the extent New York law provided the authority to enforce the Installment Payment Order by contempt proceedings, it is clearly set forth in Sections 5210 and 5251 of the CPLR.

> "§5210. Power of court to punish for contempt.
>
> "Every court in which a special proceeding to enforce a money judgment

> may be commenced, shall have power to punish a contempt of court commited with respect to an enforcement procedure."
>
> "§5251. Disobedience of subpoena, restraining notice or order; false swearing; destroying notice of sale.
>
> "Refusal or willful neglect of any person to obey a subpoena or restraining notice issued, or order granted, pursuant to this title; false swearing upon an examination or in answering written questions; and willful defacing or removal of a posted notice of sale before the time fixed for the sale, shall each be punishable as a contempt of court."

Significantly, Judge MacMahon's opinion does cite in Vail three sections of the CPLR, §§ 5223, 5224 and 5251 (Opinion pp. 2-3, fn. 4-6), as part of the statutory scheme the court reviewed in Vail, but none of those sections, (nor even other portions of Article 19 of the Judiciary Law) were found unconstitutional. One of the CPLR provisions § 5251, cited by Judge MacMahon (fn. 6) relates to the enforcement of installment payment orders, but the use of § 5251 was not enjoined in Vail.

Even if Vail were read to proscribe further use of § 5251 (a proposition Weitnauer strenuously rejects), the Contempt Order would have been validly issued since, by its terms, it was issued pursuant to Rule 14 of the Civil Rules of the Southern

and Eastern Districts of New York. The record confirms that every procedural requirement set forth in Rule 14, as well as in other applicable rules, was complied with in full.

The notice of motion and supporting affidavit was served upon Annis' attorneys, who appeared and offered papers in opposition to the motion.

According to Moore's Federal Practice,

> "[A] motion to hold a party in contempt of court is not process and may be served upon the party's attorney or upon the party himself if the court so orders ..." 2 Moore's Federal Practice ¶ 4.42(2), p. 1293.41

The order to show cause and supporting affidavit "set out with particularity the misconduct complained of" i.e., the obligation that Annis make payment from specified funds, Annis' receipt of said funds, and Annis' refusal to make said payments (DSA 3-10).

Annis' sole objection is that no oral evidence was taken as is permitted under Rule 14(b). But his contention that he placed in issue his alleged misconduct

(2 Annis Brief 28-31) is difficult to comprehend, since the affidavits he submitted in opposition to the contempt motion only confirm the alleged misconduct, i.e., his receipt of the funds and his intentional refusal to pay (DSA 13-21). His entire oral argument, as well as his papers, were addressed to rearguing matters previously considered by the Court, and although labeled a motion for modification was really a motion to reargue without a showing of new facts. In short, every procedural requirement of Rule 14 was satisfied, as Annis' argument that Rule 14 is itself unconstitutional implicity acknowledges.*

Even if this Court should give serious consideration to Annis' argument that Rule 14 is itself unconstitutional, it need hardly be stated that the Federal Courts have inherent

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* The contention that Rule 14(b) deprives Annis of his right to demand a jury trial is obviously misconceived. Since the contempt proceeding is civil in nature, and the Contempt Order limits the potential commitment to six months, there was no right to a jury trial. Shillitani v. United States, 384 U.S. 364 (1966); Cheff v. Schnackenberg, 384 U.S. 373 (1966).

as well as statutory power (18 U.S.C. § 401) to enforce their own orders by contempt proceedings. The inherent power of Federal Courts to punish for contempts including civil contempts, has been repeatedly recognized, though such inherent power was limited by statute. Raymor Ballroom Co. v. Buck, (1st Cir. 1940) 110 F. 2d 207.

The significance of this power of civil contempt was described in Raymor by Judge Magruder:

> ". . . Surely the courts are not powerless to deal with such contumacious acts as here took place; otherwise disrespect for the orderly execution of writ and process would become rampant and the efforts of court officers to discharge their duties might with impunity be turned into a burlesque . . .." 110 F. 2d at 211

Indeed, even this is conceded by appellant (2 Annis Brief at 13).

What is at issue on this appeal is a flagrant challenge to the authority and enforceability of judgments and orders of a Federal District Court. Significantly, Annis has not challenged the finding of the District Court

in its decision of October 1, 1975, that he had "diverted or otherwise secreted" income "in an effort to frustrate collection of this judgment" (A 318).* Unchallenged, too, is Annis' receipt of the $26,041.67 from General Cigar in early November after the entry of the Installment Payment Order and, in addition, the facts relating to the monthly income from General Cigar and Master Packaging are uncontroverted in this record. In United States v. United Mine Workers of America, 330 U.S. 258 (1946), the Supreme Court sustained both civil and criminal contempt orders against a Union defying the order of a district court, notwithstanding its recognition that "the defendants may have sincerely believed that the restraining order was ineffective and would be finally vacated." (330 U S. at 306) There, the Union had unsuccessfully argued that the District Court's restraining order was barred by the Norris-La Guardia Act. In the case at bar, there was obviously no basis for believing that the Installment Payment Order was void or beyond the

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* These findings alone may well justify a contempt finding. See e.g. Atlas Corporation v. DeVilliers, 447 F. 2d 799, 803 (10th Cir. 1971).

District Court's jurisdiction. The sole arguments asserted went to the court's discretion in determining the amount of the monthly payment, and thus Annis cannot claim sincere belief that the District Court had issued an invalid order.

Significantly, even where the Supreme Court had found the presence of a sincere belief in the invalidity of the order violated, it concluded:

> "Their conduct showed a total lack of respect for the judicial process." (330 U.S. at 307)

The opinion also cited a number of earlier Supreme Court decisions relating to the importance of respect for court orders, e.g.

> "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery." 330 U.S. at 290.

In sum, Annis' contention that the decision in Vail leaves the District Court without authority to issue the Contempt Order stretches the outer limits of advocacy.

POINT II

THE PROCEDURES HERE SATISFIED DUE PROCESS REQUIREMENTS SET FORTH IN VAIL v. QUINLAN

Even though Vail does not affect the validity of the contempt proceedings here, it does provide a helpful framework in which to analyze the procedures employed here against the elements of due process that the Vail court found to be necessary in a civil contempt proceeding. Before examining the specific statutory provisions in Article 19 under attack in Vail, the court there outlined the overall effect of that statutory scheme by describing the plight of the plaintiff Vail.* The contrast between the facts in Vail and the facts here could hardly be more pronounced.

First, Vail was the subject of a default judgment; here, judgment was awarded against Annis after trial at which he testified and from which he took an appeal to this

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* While certified as a class action, the three judge court in Vail noted that his case was typical.

Court.

Second, the underlying behavior leading to the contempt in Vail was the refusal to honor a subpoena, issued ex parte, to appear for a post-judgment deposition. Here, the underlying behavior was Annis' failure to obey a court order resulting from a litigated motion in which he was represented by counsel.

Third, upon Vail's failure to appear at the deposition, an order to show cause was issued and on the return date of the order to show cause for which he failed to appear, an order imposing fine was issued. Then, upon Vail's failure to comply with that order and pay the fine, the contempt order was applied for and received, ex parte, on the application of the judgment creditor's attorney. Pursuant to that order Vail was arrested and jailed.

As is apparent from the above history of that proceeding, from the time the proceeding was instituted against him through the time he was committed Vail never appeared in court or had an attorney appear on his behalf.

There should be no need to reemphasize the numerous appearances of Annis and his counsel in these proceedings from the inception through and including the instant appeals.

The court in Vail found that the statutory scheme in Article 19 permitted:

> "The debtor to be thrown in jail without an actual hearing on the basic issue of whether he had paid or is able to pay the fine, whether his assets were originally exempt from execution or whether he ever received notice of the order to show cause or was otherwise notified of the hearing." (Opinion at 9)

The court's characterization of the infirmities with the procedures in Article 19 are broken down more specifically in that court's description of the plaintiff's contentions. As the plaintiff argued, the court found, in effect, that the statutory scheme under attack was constitutionally defective because it:

(1) allowed the adjudication of contempt and issuance of order of imprisonment without an actual hearing;

(2) contained no provision for adequate notice or warning of the consequences for the failure to appear on the return date of the order to show cause;

(3) provided for imprisonment of the debtor without informing him of his right to counsel and to assigned counsel if indigent; and

(4) imposed fines and incarceration which were punitive, instead of remedial.

Taking these four elements one at a time, it is clear that in the proceedings at bar Annis did have the benefit of all of the procedural safeguards found to be lacking in the statutory scheme challenged in Vail.

1. The Right to a Hearing

Citing McNeil v. Director, Patuxent Institution, 407 U.S. 245, 251 (1972), a case involving the validity of an indefinite term of commitment as a "defective delinquent" and Harris v. United States, 382 U.S. 162, 167 (1965), a case involving a criminal contempt proceeding under Rule 42(b) of the Federal Rules of Criminal Procedure, the court in Vail held that a civil contempt finding could properly be made only on a "hearing with both parties present." It struck as unconstitutional those sections of Article 19

which allowed for imprisonment on an attorney's affidavit of service and on ex parte proceeding upon a failure to appear, as occurred in the case of plaintiff Vail.

Here, Annis not only had a right to a hearing, he, in fact, had more than one hearing with both parties participating. Obviously, the first and most extensive hearing was in connection with the motion for an Installment Payment Order. The facts with respect to that hearing, the evidence submitted (including Annis' own testimony in the extensive transcripts) and the thoroughness of the District Court's investigation of the facts is discussed at length in Weitnauer's brief in the companion appeal (Weitnauer Brief, Point I at 8-24). Subsequent to that hearing the parties had additional time in which they both submitted proposed orders to the District Court. Moreover, both parties submitted affidavits in connection with the proposed orders.

Next, Annis had the benefit of a further opportunity to be heard on the return date of the contempt motion. At that time, the facts as to Annis' receipt of funds out of

which he was ordered to make payments were presented to the Court by affidavits (DSA 7-8, 41-42) and by documentary evidence annexed to his counsel's affidavit (DSA 18-20). These facts never have been disputed.

As noted in Point I above, Rule 14(b) only calls for a hearing when the alleged contemnor places in issue the facts of "his alleged misconduct or the damages thereby ensuing." Here, on the return date of the contempt motion the only facts not previously before the Court when it issued the Installment Payment Order, were as follows:

> (a) On November 6 Annis received $26,041.67 from General Cigar;
>
> (b) During November and again during December Annis received additional sums of approximately $2,093 a month from General Cigar;
>
> (c) In November and December he also became entitled to receive an aggregate of $2,900 each month pursuant to his marketing agreement with Master Packaging.

Notwithstanding the absence of any issue as to the alleged misconduct, Annis did have a hearing at that time.

Accordingly, Annis' extensive reliance on cases, such as Caruso v. Schilingo, 23 A.D. 2d 627, 257 N.Y.S. 2d 719 (4th Dept. 1965) and Sure Fire Fuel Corp. v. Martinez, 75 Misc. 2d 714 (Civ. Ct. N.Y.Co. 1973) is wholly unfounded. For example, in Caruso the court noted that, although the defendant was represented by counsel, only procedural arguments were raised in opposition to the contempt motion and there was no evidence that"the court examined into the merits of the proceeding and into the defendant's ability to make the payments directed in the prior order." (257 N.Y.S. 2d at 720) Here, as noted above, the District Court had conclusive and documented evidence, which was wholly undisputed, showing that Annis had received the monies out of which the prior order directed him to make the installment payments.

The distinction between the facts here and those of Sure Fire Fuel Corp., supra, are even more vivid. There, the court in exercise of its own discretion in the absence of an appearance by the defendant alleged contemnor

refused to enter a contempt order because no evidence was before the court as to his receipt of income from which to make payments pursuant to a stipulated installment payment order.

In view of the clear evidence before the District Court here, Annis' citation of Maggio v. Zeitz, 333 U.S. 56 (1948), is hardly helpful to him. On the basis of the record below, the court properly concluded that the coercion of civil contempt proceedings was justified, because there was conclusive evidence that Annis had received sufficient monies from which the ordered payments could be made. This conclusion is, of course, further bolstered by the District Court's findings in its opinion of October 6, 1975, that Annis, in an effort and scheme to frustrate collection of the judgment, had diverted and secreted income and other assets (A 318, 323).

And Annis had yet further and subsequent hearings on these issues. As outlined in the Statement of the Facts and Prior Proceedings and in his brief in this appeal (2 Annis Brief at 5-9) Annis had the benefit of additional

hearings before the District Court and this Court, including an extensive argument before a full panel of Circuit Judges, at which he was granted interim relief including expedition of these appeals.

Based on the facts and proceedings here, it cannot be seriously argued that Annis was deprived of the right of an opportunity to be heard "at a meaningful time and in a meaningful manner," Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

2. Adequate Notice

As stated by the court in Vail, "A concomitant to a fair hearing is notice appropriate to the nature of the case." (Opinion at 11) Based on the facts of plaintiff Vail's commitment, obtained ex parte, the court held that "fundamental fairness requires that the show cause order contain a clear statement of the purpose of the hearing and a stark warning that failure to appear may result in contempt of court and imprisonment." Annis appears to argue that he was deprived of this element of due process because the order to show cause to adjudge him in

contempt was served on his attorneys and because the order to show cause did not specifically state that a failure to appear could result in imprisonment (2 Annis Brief at 18-19).

Significantly, there is no assertion, or even suggestion, that Annis failed to have actual notice of (1) the nature, time and place of the proceedings and (2) the nature of the relief sought and (3) the possible consequences, including his commitment. His argument merely seems to be that Rule 14 could be applied in a way so as to deprive a party of proper notice and hence notice given pursuant to its provisions, even when the actual notice provided is "appropriate to the nature of the case" - as it was here - is somehow constitutionally inadequate.

Moreover, as noted above in the Statement of Facts and Prior Proceedings, the order to show cause, here, did make specific reference to adjudication for contempt (DSA 3-4) and the supporting affidavit served with the show cause order specifically requested that an order issue for Annis' commitment (DSA 9). Most significant, of course, is

the fact that Annis did appear by counsel on the return date of the order to show cause and as Annis has stated to this Court: "Appellant's attorneys also strenuously opposed Appellee's attempt to have Appellant held in contempt of court," (2 Annis Brief at 4). And, of course, the attorneys that appeared for him were the same attorneys served with the order to show cause.

Equally unfounded is Annis' argument that the contempt proceedings were invalid because he was not personally served with the notice of motion for an installment payment order in May 1975 or with the Installment Payment Order of October 30, 1975. These arguments are every bit as formalistic and hypothetical as the arguments regarding notice of the contempt motion, since actual notice never has been disputed and technical defects, if any, were long ago waived by Annis' appearance through counsel throughout these proceedings.

If and to the extent Weitnauer's notice of motion for an Installment Payment Order was required to be personally served on Annis pursuant to CPLR § 5226, that requirement

clearly was waived by defendant's opposition to the motion through counsel and the subsequent submission of additional papers in opposition to the motion (A 72-79). CPLR § 5226 calls for service "in the same manner as a summons" and, accordingly, Article 3 of the CPLR and, particularly, Rule 320(b) thereof as to waiver by appearance, apply to that requirement. No objection to service was made until the December 18, 1975 motion for a stay of the contempt order (DSA 112) - over seven months after the appearance of the defendant through counsel in opposition to the motion, not to mention Annis' multiple prior applications for relief in connection therewith. It would seem that Rule 12 (h) of the FRCP is also conclusive of waiver on this point.

Equally specious is Annis' belated contention (DSA 112) that, absent formal service of the Installment Payment Order, he was free to disregard it. Annis cannot seriously suggest that he lacked notice of the Installment Payment Order, since his own attorneys served a notice of appeal from it on November 21. Annis' contention that the

notice of appeal was drafted by Florida and not New York counsel, by whom it was served and filed, only shows that both sets of counsel representing him in the matter, had notice of it. Moreover, it has been conceded that defendant received a check from General Cigar for $26,041.67 on or about November 6, which check was only to be released upon issuance of the very order that directed installment payments.

Significantly, while a copy of the Installment Payment Order was annexed to the contempt motion served December 3 (DSA 11), at no time, and indeed to the very date of this appeal, has Annis denied receipt of the Installment Payment Order or notice of its contents. Indeed, Annis' attorneys submitted three affidavits in opposition to the motion to adjudge him in contempt and in none of them was notice to Annis of the terms of the Installment Payment Order ever questioned (DSA 13-20; 23-39). Furthermore, upon the argument of the contempt motion before Judge Carter on December 9, 1975, the Court asked Annis' attorneys whether or not any of the facts establishing Annis' contempt, as set

forth in plaintiff's moving affidavit, were disputed. Annis at that time not only failed to challenge his receipt of monies and his failure to comply with his obligations set forth in the Installment Payment Order, but he also failed to raise any issue as to notice of the Installment Payment Order or of subsequent contempt proceedings.

Although Annis relies on CPLR § 5104 for the proposition that a certified copy of the underlying order on which the subsequent contempt action is based must be served on the party required to obey it, it is clear that even if New York State law governs this question, § 5104 is not the applicable section. See 5 Weinstein-Korn-Miller at 51-31 through 51-53. Instead, to the extent state law applies, § 5251 clearly governs contempt proceedings resulting from the failure to comply with an order directing installment payments. "The failure of a judgment debtor to pay installment payments ordered under CPLR 5226, is punishable as a contempt of court under CPLR 5251."*

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* Significantly, as noted in Point I above, although the court in Vail referred to CPLR § 5251 (p.3, fn. 6), it left that contempt provision undisturbed.

6 Weinstein-Korn-Miller at 52-415. Moreover, it is clear that mere notice of the underlying order and its terms - and not service of a certified copy - is sufficient under § 5221. See 6 Weinstein-Korn-Miller at 52-749 through 52-752. Similarly, under federal law there is no requirement of service upon the party. 2 Moore's Federal Practice, ¶4.42(2), p. 1293.41.

Finally, although not before this Court now, there can be no question that Annis has had personal notice of the Installment Payment Order since mid December when he was adjudged in contempt, and none of the further payments required thereunder has been made. Clearly, compliance in his case does not turn on notice.

3. Right to Counsel

Based on the foregoing and the very fact of the instant appeals, there can be no question that Annis knew of his right to counsel, since his apparently extensive resources enabled him to engage counsel of his choosing for every aspect of these proceedings. Indeed, as the record shows, Annis has had the benefit of counsel both in New York, where the litigation is pending, and in Tampa, Florida, where he resides (DSA 14-15); 2 Annis Brief at 33).

4. The Contempt Sanctions are Remedial

The fourth element of the statutory scheme challenged and stricken in Vail was the imposition of fines plus costs when the contempt has not been shown to have resulted in any loss or injury to the judgment creditor. Clearly, the Contempt Order in this action is purely remedial. The only fine imposed, in the amount of $34,031.34 (DSA-102), equalled the accrued past due installment payments as to which the finding of contempt applies. Hence, that fine equalled the precise amount of injury suffered by Weitnauer as a result of Annis' defiance of the Installment Payment Order.

Secondly, the provision in the Contempt Order for Annis' arrest and commitment is wholly coercive and remedial as it provides for commitment only until the fine has been paid (DSA-103). Moreover, as a protective device and in compliance with Rule 14 the term of commitment is limited to a maximum of six months (DSA-103).

The only additional sanction included in the Contempt Order is the requirement to pay counsel fees

incurred in connection with the contempt proceedings in the amount of $1,595.00 (DSA-102). Again, this portion of the sanction is wholly remedial as it merely compensates Weitnauer for necessary legal expenses incurred. The evidentiary basis for the determination of the amount of counsel fees was an affidavit of Victor A. Kovner dated December 17, 1975, which sets forth the services performed, the time spent and the hourly rates billed by the attorneys engaged in the contempt proceedings on Weitnauer's behalf.* Contrary, then, to the punitive fines stricken by the court in Vail, all of the sanctions contained in the Contempt Order here were "based upon evidence of complainant's actual loss" and were for the very purposes civil contempt is designed to

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* Although the affidavit of services has not been included in the supplemental appendix, it does constitute a part of the record on this appeal. The counsel fees included in the Contempt Order by the District Court are less than the aggregate fees set forth in the affidavit of services, since the District Court declined to award fees for time spent resisting Annis' applications to this Court, which were separately included and described in the affidavit of services.

meet: "to coerce the defendant into compliance with the Court's Order and to compensate the complainant for losses sustained." United States v. United Mine Workers of America, 330 U.S. 258, 303-304 (1947).

Clearly the holding in Vail affords Annis no grounds for this appeal.

CONCLUSION

For the foregoing reasons, the Contempt Order of the District Court should be affirmed in every respect.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HARRY VAIL, JR., PATRICK WARD and RICHARD McNAIR, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

-against-

LAWRENCE M. QUINLAN, Individually and in his capacity as Sheriff of Dutchess County, JOSEPH JUIDICE, Individually and in his capacity as a Judge of the Dutchess County Court, RAYMOND E. ALDRICH, JR., Individually and in his capacity as a Judge of the Dutchess County Court, PUBLIC LOAN COMPANY, INC., ARNOLD GORAN, M.D., P.C., and GEORGE MONTGOMERY, JR., M.D.,

Defendants.

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OPINION

#43671

APPEARANCES:

Mid-Hudson Valley Legal Services Project (Monroe County Legal Assistance Corp.), Poughkeepsie, N.Y., and Greater Up-State Law Project, Rochester, N.Y. (John D. Gorman, Jane E. Bloom, K. Wade Eaton and Rene H. Reixach, Jr., of counsel), for plaintiffs.

Louis J. Lefkowitz, Attorney General of the State of New York, New York, N.Y. (A. Seth Greenwald, Asst. Attorney General, of counsel), for defendants Juidice and Aldrich and Pro Se pursuant to New York Executive Law § 71.

Joel T. Camche, New York, N.Y., for defendant Quinlan.

Before LUMBARD, Circuit Judge, and MacMAHON and CANNELLA, District Judges.

This three-judge court has been convened, pursuant to 28 U.S.C. § 2281, to hear and determine this action, brought under the Civil Rights Act and its jurisdictional counterpart, 42 U.S.C. § 1983, 28 U.S.C. § 1343(3), by individual judgment debtors [redacted] and all others similarly situated. Challenging the constitutionality of certain statutes of the State of New York, plaintiffs seek class action determination[1] and money damages, as well as declaratory and injunctive relief.

The challenged statutes, Sections 756, 757, 765, 767, 769-775[2] of Article 19 of the New York Judiciary Law (McKinney 1968), implement supplementary or post-judgment proceedings for collection of money judgments. They permit a judgment debtor, who has failed to comply with a disclosure subpoena concerning his ability to satisfy a judgment debt, to be held in contempt, fined and imprisoned without a hearing.

We hold that certain of the statutes in question, specifically, Sections 756, 757, 770, 772, 773, 774 and 775, violate the due process clause of the Fourteenth Amendment and accordingly that they are void and may no longer be enforced.[3]

STATUTORY SCHEME

A creditor, unable to satisfy a money judgment, may compel a judgment debtor to disclose all matter relevant to satisfaction of the judgment.[4] Disclosure is generally effected by requiring the debtor, in response to a subpoena issued by the creditor, to attend a deposition or to supply

information by answers to written questions submitted by the creditor.[5] False swearing or failure to comply with the subpoena is punishable as a contempt of court.[6]

Procedures by which a debtor is held in contempt are set out in the Judiciary Law and constitute the statutory scheme challenged here. If the debtor does not comply with the disclosure subpoena, an order requiring him to show cause why he should not be punished for contempt will issue solely upon the basis of an affidavit by the creditor's attorney showing that the debtor failed to respond to the subpoena (§ 757(1)). If the debtor does not appear for a hearing upon the return date of the order to show cause, the court will make a final order directing that he be punished by fine or imprisonment (§§ 77 770). The fine is in an amount sufficient to indemnify the creditor for any loss or injury caused as a result of the debtor's contempt, or, if no loss or injury is shown, in an amount not exceeding costs plus $250 (§ 773).

On the basis of an affidavit of the creditor's attorney showing that a demand for payment of the fine has been made and refused, an ex parte warrant is issued committing the debtor to prison until the fine is paid (§ 756). The debtor may remain incarcerated for up to 90 days before he is brought before the court for a review of the proceedings and a determination as to whether he should be discharged from imprisonment (§ 774). If the debtor is unable to endure the incarceration or to pay the sum of money, he may petition the court for release (§ 775), but the burden of proof is on the debtor to show why he should no longer be held.[7]

The case of the plaintiff Vail is typical of the plight of the judgment debtor under the challenged statutory scheme. Vail and his wife were the subject of a default judgment for $534.63 entered in favor of Public Loan Company in January 1974. At that time, Vail and his family were on public assistance. On April 22, 1974, Charles Morrow, attorney for Public Loan, caused a subpoena to be served on Vail, requiring him to appear on May 28 before Charles Morrow for the taking of a deposition regarding all matters relevant to the satisfaction of the judgment. Vail did not appear for the deposition.

On the basis of the subpoena, an affidavit of due service, and an affidavit by Charles Morrow that Vail did not appear and that his conduct was calculated to and did actually defeat, impair and prejudice the rights and remedies of the judgment creditor, Judge Joseph Juidice of the Dutchess County Court issued an order on July 22 directing Vail to appear at the Dutchess County Court on August 13, to "show cause why he should not be punished as for contempt for violation of and noncompliance with the said subpoena in that he failed to appear or respond thereto." When Vail did not appear in County Court, Judge Juidice issued an "Order Imposing Fine," which held Vail in contempt and required him to pay $270 to the judgment creditor.

When Vail failed to comply[8] with the Order Imposing Fine, Charles Morrow, on the basis of the papers previously submitted on the application for the order to show cause, an affidavit of due service of the Order Imposing Fine, and an affidavit of Morrow that Vail had not complied, applied for and obtained an ex parte commitment order on September 23.

The commitment order directed that, without further notice, the sheriff of any county arrest Vail and commit him to the county jail, that he be held in custody until the fine of $270 was paid, together with the sheriff's fees and the disbursements on the execution of the order.

Vail was arrested in his home on October 1 and committed to the Dutchess County Jail. At the time, he had only one dollar to last him until he received his next public assistance check. He and his family owned no property except household furniture and clothing. Vail was released the next day when a relative loaned him $294.25 to pay the fine plus additional costs.

ABSTENTION

A preliminary question for determination is whether we shou'd abstain from deciding the issues raised in this action. Plaintiffs never raised their constitutional claims in state court, although the challenged statutory scheme does provide an opportunity for a hearing. Defendants contend that federal intervention before the state has an opportunity to construe its own laws is an untenable interference with the duty and authority of the state courts to enforce their judgments. Further, defendants cryptically assert that, even if no appeal is available from any or some of the orders of the defendant judges, a debtor in plaintiffs' posture must still exhaust his state appellate remedies.[9]

Abstention is a judge-made doctrine based on considerations of federalism and a need to avoid premature constitutional adjudication. It allows a federal court, although having jurisdiction, to decline decision on the merits of the controversy. The doctrine is invoked when determination of a state law issue may resolve or materially alter the constitutional claim.[10]

Defendants first contend that since the issues raised here have never been presented to a state court, interests of comity and federalism warrant dismissal of the action. It is clear, however, that when the challenge is to the constitutionality of statutes which are not ambiguous, abstention should not be used to require vindication of a federal claim in state court.[11]

The method by which the civil contempt provisions are implemented cannot be in doubt, for each of the representative plaintiffs has been subjected to these statutes. The challenged statutes were originally enacted in 1909. They are not ambiguous on their face; nor have defendants suggested a limiting construction by which a state court could resolve the constitutional claim. We think, therefore, that we should not decline to reach the merits of this case under the traditional formulation of the doctrine of abstention.

More forcefully, defendants contend that the abstention doctrine articulated in Younger v. Harris, 401 U.S. 37 (1971), should bar this action. In Younger, the Supreme

Court held that considerations of comity and the reluctance of equity courts to interfere with criminal prosecutions prevented a federal court from intervening by way of an injunction or declaratory judgment in a criminal prosecution pending in state court. Younger was expanded in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), to apply to a civil proceeding brought under a state's nuisance statute to enjoin exhibition of obscene films.

Huffman did not extend Younger to apply to all pending state court actions. The Supreme Court characterized the nuisance proceedings as "more akin to a criminal prosecution than most civil cases."[12] In Huffman, the state was a party to the proceedings because the action had been brought by the county prosecutor. Enforcement of the nuisance statute was found to be in aid of, and closely related to, criminal statutes which prohibited the exhibition of obscene materials. The Court, therefore, held Younger to apply to civil proceedings only when intervention would disrupt the very interests which would underlie a state's criminal laws.

In Anonymous v. Association of the Bar of the City of New York, 515 F.2d 427 (2d Cir. 1975), the question was whether intervention in a state disbarment proceeding was comparable to the disruption in Huffman.[13] The court found that it was, noting the characterization of the proceedings as quasi-criminal and the state's special interest in controlling the fitness and character of members of the bar.

When the circumstances of the instant case are measured against Huffman and Anonymous, it is clear that they do not fit within the limited extention of Younger. The

challenged statutory scheme is designed to facilitate a creditor's collection of a judgment debt. The civil contempt proceedings are initiated by private parties to enforce compliance with subpoenas issued by private attorneys. They are not related to New York's criminal statutes; nor do they play any part in the enforcement of the state's criminal laws. Moreover, the challenged proceedings are defined as civil by the Judiciary Law.[14]

It is also a predicate for Younger dismissal that the parties have an opportunity to raise and have their federal issues decided by a competent state tribunal.[15] Under Article 19 of the Judiciary Law, a debtor who fails to appear at the show cause hearing may be found in contempt, fined and subjected to incarceration ex parte (§ 770). If the court merely imposes a fine which the debtor fails to pay on demand, a warrant is issued ordering the debtor's imprisonment (§ 756). The challenged statutes, therefore, permit the debtor to be thrown in jail without an actual hearing on the basic issues of whether he has paid or is able to pay the fine, whether his assets were originally exempt from execution, or whether he ever received notice of the order to show cause or was otherwise notified of the hearing.

In Gerstein v. Pugh, 420 U.S. 103 (1975), the Supreme Court held that a federal court injunction against the detention of a criminal defendant on the basis of an Information did not violate principles of Younger. The Court distinguished between an injunction brought against a state criminal prosecution and one directed against incarceration without a preliminary hearing.[16] Since plaintiffs claim that the statutory scheme challenged here also permits incarceration without

a preliminary hearing, Younger does not apply.

CONSTITUTIONAL VALIDITY

Plaintiffs level four independent attacks under the due process clause against the statutory scheme supporting the civil contempt provisions of the Judiciary Law: (1) Sections 756, 757, 770, 773 and 774 permit an adjudication of contempt and order of imprisonment without an actual hearing; (2) Section 757 does not provide for adequate notice or warning of the consequences of failure to appear at the show cause hearing; (3) Sections 756, 770, 772 and 774 subject the debtor to imprisonment without informing him of his right to counsel and to assigned counsel if indigent; and (4) the fines and incarceration permitted under Sections 756, 770, 773 and 774 are punitive. Defendants contend that the notice and hearing provisions of the statutory scheme are sufficient under the due process clause. In examining these contentions, we recognize that the degree of procedural safeguard required by the constitution will be influenced by the importance of the private interest effected.[17]

It is clear that the challenged sections of the Judiciary Law provide an opportunity for a hearing at the time the show cause order is made returnable. However, if the debtor does not appear, he is adjudged in contempt and subject to a warrant of commitment. Due process requires more than the mere opportunity to be heard when the interest involved is deprivation of the debtor's liberty. The statutory scheme presently allows imprisonment solely on the basis of a creditor's affidavit of service and an ex parte proceeding. A finding of contempt can be properly made only upon a hearing

with both parties present.[18] The defect is not cured by providing a hearing within 90 days of incarceration. If a hearing is to serve its full purpose, it must be held before, not after, imprisonment.[19]

A concomitant to a fair hearing is notice appropriate to the nature of the case.[20] Here, notice must be complete and clear, given the substantial deprivation of liberty that may result from failure to respond. Fundamental fairness requires that the show cause order contain a clear statement of the purpose of the hearing and a stark warning that failure to appear may result in contempt of court and imprisonment.[21]

Moreover, the right to a hearing prior to imprisonment is ineffective without counsel.[22] The debtor cannot be expected to understand, much less to present, the legal and factual defenses to a finding of contempt that might be raised. Surely, a debtor who is deprived of his liberty is as much entitled to due process as is a defendant charged with a crime.[23]

Finally, although it is well established that judicial sanctions in civil contempt are proper to compensate the complainant for losses sustained or to coerce compliance with a court's order,[24] the sanctions imposed under the challenged statutes are neither remedial nor coercive, but punitive. Where compensation is intended and a fine imposed, it must be based on evidence of the complainant's actual loss.[25] Section 773 requires the imposition of a fine up to $250 plus costs when the alleged contempt has not been shown to have resulted in any loss or injury to the creditor. If coercion is the purpose of the sanction, it can be justified only if the person has the ability to comply. The

absence of the procedural safeguards of indictment and jury trial can be justified only by the conditional nature of the imprisonment and the contemnor's continued defiance.[26] Section 756 permits the arrest and incarceration of a debtor, whether or not he is able to comply with the order by paying the fine. To the extent, therefore, that the fines and imprisonment contained in the Judiciary Law are punitive, they cannot be imposed in a civil contempt proceeding.[27]

Accordingly, under the due process clause of the [illegible] Constitution, the Court declares the statutes unconstitutional and enjoins further application of Sections 756, 757, 770, 772, 773, 774 and 775 of Article 19 of the New York Judiciary Law.

So ordered.

Dated: New York, N.Y.
January 7, 1976

Edward Lumbard, U.S.C.J.

[illegible], U.S.D.J.

Charles H. Tenney, U.S.D.J.

FOOTNOTES

1. The certification of this action as a class action was made by Judge MacMahon, acting as a single district court judge, pursuant to 28 U.S.C. § 2284(5), and the limited three-judge court jurisdiction set forth by the Supreme Court. See Hagans v. Lavine, 415 U.S. 533, 543-45 (19

2. § 756. Issue of warrant without notice

Where the offense consists of a neglect or refusal to obey an order of the court, requiring the payment of costs, or of a specified sum of money, and the court is satisfied, by proof, by affidavit, that a personal demand thereof has been made, and that payment thereof has been refused or neglected, it may issue, without notice, a warrant to commit the offender to prison, until the costs or other sum of money, and the costs and expenses of the proceeding, are paid, or until he is discharged according to law.

§ 757. Order to show cause, or warrant to attach offender

The court or judge, authorized to punish for the offense, may, in its or his discretion, where the case is one of those specified in either section seven hundred and fifty-five or seven hundred and fifty-six, and, in every other case, must, upon being satisfied, by affidavit, of the commission of the offense, either

1. Make an order, requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offense; or

2. Issue a warrant of attachment, directed to the sheriff of a particular county, or, generally, to the sheriff of any county where the accused may be found, commanding him to arrest the accused, and bring him before the court or judge, either forthwith, or at a time and place therein specified, to answer for the alleged offense.

Where the order to show cause, or the warrant, is returnable before the court, it may be made, or issued, as prescribed in this section, by any judge authorized to grant an order without notice, in an action pending in the court; and it must be made returnable at a term of the court, at which a contested motion may be heard.

§ 765. Execution of warrant when undertaking not given

If an indorsement is not made upon the warrant, as prescribed in section seven hundred and sixty-four; or if such an indorsement is made and an undertaking is not given, as prescribed in section seven hundred and sixty-six; the sheriff, after making the arrest, as required by the warrant, must keep the accused in his custody, until the further direction of the court, judge, or referee. Where, from sickness or any other cause, the accused is physically unable to attend before the court, judge, or referee, that fact is a sufficient excuse to the sheriff for not producing him as required by the warrant. In that case, the sheriff must produce him, as directed by the court, judge, or referee, after he becomes able to attend. The sheriff need not, in any case, confine the accused in prison, or otherwise restrain him of his liberty, except as far as it is necessary so to do, in order to secure his personal attendance.

§ 767. When habeas corpus may issue

If the accused is in the custody of a sheriff, or other officer, by virtue of an execution against his person, or by virtue of a mandate for any other contempt or misconduct, or a commitment on a criminal charge, a warrant of attachment can not be issued. In that case, the court, upon proof of the facts, must issue a writ of habeas corpus, directed to the officer, requiring him to bring the accused before it, to answer for the offense charged. The officer to whom the writ is directed, or upon whom it is served, must, except in a case where the production of the accused under a warrant of attachment would be dispensed with, bring him before the court, and detain him at the place where the court is sitting, until the further order of the court.

§ 769. Interrogatories and proofs

When the accused is produced, by virtue of a warrant, or a writ of habeas corpus, or appears upon the return of a warrant, the court, judge, or referee, must, unless he admits the offense charged, cause interrogatories to be filed, specifying the facts and circumstances of the offense charged against him. The accused must make written answers thereto, under oath within such reasonable time as the court, judge, or referee allows therefor; and either party may produce affidavits, or other proofs, contradicting or corroborating any answer. Upon the original affidavits, the answers, and subsequent proofs, the court, judge, or referee must determine whether the accused has committed the offense charged.

§ 770. Final order directing punishment; exception

If it is determined that the accused has committed the offense charged; and that it was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of a party to an action or special proceeding, brought in the court, or before the judge or referee; the court, judge, or referee must make a final order directing that he be punished by fine or imprisonment, or both, as the nature of the case requires. A warrant of commitment must issue accordingly, except where an application is made under this article and in pursuance of section two hundred forty-five of the domestic relations law or any other section of law for a final order directing punishment for failure to pay alimony and/or counsel fees pursuant to an order of the court or judge in an action for divorce or separation and the husband appear and satisfy the court or a judge before whom the application may be pending that he has no means or property or income to comply with the terms of the order at the time, the court or judge may in its or his discretion deny the application to punish the husband without prejudice to the wife's rights and without prejudice to a renewal of the application by the wife upon notice and after proof that the financial condition of the husband is changed.

§ 771. Punishment upon return of habeas corpus

Where the accused is brought up by virtue of a writ of habeas corpus, he must, after the final order is made, be remanded to the custody of the sheriff, or other officer, to whom the writ was directed. If the final order directs that he be punished by imprisonment, or committed until the payment of a sum of money, he must be so imprisoned or committed, upon his discharge from custody under the mandate, by virtue of which he is held by the sheriff, or other officer.

§ 772. Punishment upon return of order to show cause

Upon the return of an order to show cause, the questions which arise must be determined, as upon any other motion; and, if the determination is to the effect specified in section seven hundred and seventy, the order thereupon must be to the same effect as the final order therein prescribed. Upon a certified copy of the order so made, the offender may be committed, without further process.

§ 773. Amount of fine

If an actual loss or injury has been produced to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury. Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. A corporation may be fined as prescribed in this section.

§ 774. Length of imprisonment and periodic review of proceedings

1. Where the misconduct proved consists of an omission to perform an act or duty, which is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it, and paid the fine imposed, but if he shall perform the act or duty required to be performed, he shall not be imprisoned for the fine imposed more than three months if the fine is less than five hundred dollars, or more than six months if the fine is five hundred dollars or more. In such case, the order, and the warrant of commitment, if one is issued, must specify the act or duty to be performed, and the sum to be paid. In every other case, where special provision is not otherwise made by law, the offender may be imprisoned for a reasonable time, not exceeding six months, and until the fine, if any, is paid; and the order, and the warrant of commitment, if any, must specify the amount of the fine, and the duration of the imprisonment. If the term of imprisonment is not specified in the order, the offender shall be imprisoned for the fine imposed three months if the fine is less than five hundred dollars, and six months if the fine imposed is five hundred dollars or more. If the offender is required to serve a specified term of imprisonment, and in addition to pay a fine, he shall not be imprisoned for the nonpayment of such fine for more than three months if such fine is less than five hundred dollars or more than six months if the fine

imposed is five hundred dollars or more in addition to the specified time of imprisonment.

2. In all instances where any offender shall have been imprisoned pursuant to article nineteen of the judiciary law and where the term of such imprisonment is specified to be an indeterminate period of time or for a term of more than three months, such offender, if not then discharged by law from imprisonment, shall within ninety days after the commencement of such imprisonment be brought, by the sheriff, or other officer, as a matter of course personally before the court imposing such imprisonment and a review of the proceedings shall then be held to determine whether such offender shall be discharged from imprisonment. At periodic intervals of not more than ninety days following such review, the offender, if not then discharged by law from imprisonment, shall be brought, by the sheriff, or other officer, as a matter of course personally before the court imposing such imprisonment and further reviews of the proceedings shall then be held to determine whether such offender shall be discharged from imprisonment. Where such imprisonment shall have arisen out of or during the course of any action or proceeding, the clerk of the court before which such review of the proceedings shall be held, or the judge or justice of such court in case there be no clerk, shall give reasonable notice in writing of the date, time and place of each such review to each party or his attorney who shall have appeared of record in such action or proceeding, at their last known address.

§ 775. When court may release offender

Where an offender, imprisoned as prescribed in this article, is unable to endure the imprisonment, or to pay the sum, or perform the act or duty, required to be paid or performed, in order to entitle him to be released, the court, judge, or referee, or, where the commitment was made to punish a contempt of court committed with respect to an enforcement procedure under the civil practice law and rules, the court, out of which the execution was issued, may, in its or his discretion, and upon such terms as justice requires, make an order, directing him to be discharged from the imprisonment.

3. In view of this conclusion, we do not reach plaintiffs' further contention that the statutes also violate the equal protection clause of the Fourteenth Amendment and the Fourth, Sixth and Eighth Amendments.

With regard to plaintiffs' claim for money damages, the doctrine of judicial immunity bars recovery against defendants Juidice and Aldrich, both judges of the Dutchess County Court. Apton v. Wilson, 506 F.2d 83 (D.C. Cir.

1974); Hill v. McClellan, 490 F.2d 859 (5th Cir. 1974); Blouin v. Dembitz, 489 F.2d 488 (2d Cir. 1973). Since there are no allegations of malice or bad faith regarding the conduct of defendant Quinlan, sheriff of Dutchess County, the damage claims against him must also be dismissed. Pierson v. Ray, 386 U.S. 547 (1967); Tucker v. Maher, 497 F.2d 1309 (2d Cir. 1974); Fleming v. McEnany, 491 F.2d 1353 (2d Cir. 1974). There being no evidence before us concerning the damages caused by the other defendants, we take no position with respect to the remaining claims for monetary relief.

4. Section 5223, N.Y. CPLR.

5. Section 5224, N.Y. CPLR.

6. Section 5251, N.Y. CPLR, provides: "Refusal or wilful neglect of any person to obey the subpoena . . . shall . . . be punishable as a contempt of court."

7. Vought v. Vought, 42 Misc.2d 16, 247 N.Y.S.2d 468 (1964); In re Black's Estate, 261 App. Div. 791, 28 N.Y.S.2d 130 (1941).

8. Vail alleges that, at the end of August, he informed Public Loan that he could not make payments on the underlying debt because of his indigency, but that one of the creditor's employees told him "he would not have to appear in Court' if he made a payment of $5., which Vail did.

9. Defendants' brief, p. 12.

10. Kusper v. Pontikes, 414 U.S. 51, 54-55 (1973); Harman v. Forssenius, 380 U.S. 528, 534 (1965).

11. Wisconsin v. Constantineau, 400 U.S. 433, 438-439 (1971); Zwickler v. Koota, 389 U.S. 241, 250-251 (1967); Harman v. Forssenius, supra.

12. Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975).

13. Anonymous v. Association of the Bar of the City of New York, 515 F.2d 427, 432 (2d Cir. 1975).

14. Section 753, Article 19, N.Y. Judiciary Law.

15. Huffman v. Pursue, Ltd., supra, 420 U.S. at 594.

16. Gerstein v. Pugh, 420 U.S. 103, 108 n.9 (1975).

17. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Fuentes v. Shevin, 407 U.S. 67, 82 (1972); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

18. McNeil v. Director, Patuxent Institution, 407 U.S. 245, 251 (1972); Harris v. United States, 382 U.S. 162, 167 (1965).

19. Fuentes v. Shevin, supra; Desmond v. Hachey, 315 F. Supp. 328 (D. Me. 1970); In re Harris, 69 Cal. 2d 486, 446 P.2d 148 (1968).

A section providing that, upon arrest for failure to respond to an order to show cause, the sheriff must bring the debtor directly before the court, might pass constitutional muster if the show cause order clearly advises the debtor that failure to respond might result in the issuance of a warrant for his arrest. Cf. Non-Resident Taxpayers Ass'n of Pa. and N.J. v. Murray, 347 F. Supp. 399 (E.D. Pa. 1972), aff'd, 410 U.S. 919 (1973); N.Y.

20. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

21. See Lynch v. Baxley, 386 F. Supp. 378, 388 (M.D. Ala. 1974) (three-judge court).

22. Argersinger v. Hamlin, 407 U.S. 25 (1972); Powell v. Alabama, 287 U.S. 45 (1932).

23. Cooke v. United States, 267 U.S. 517, 537 (1925); United States v. Sun Kung Kang, 468 F.2d 1368 (9th Cir. 1972); Abbit v. Bernier, 387 F. Supp. 57, 62 n.12 (D. Conn. 1974) (three-judge court); In re Harris, supra.

24. United States v. United Mine Workers of America, 330 U.S. 258, 303-304 (1947).

25. United States v. United Mine Workers of America, supra, 330 U.S. at 304; Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 455-456 (1932).

26. McNeil v. Director, Patuxent Institution, supra, 407 U.S. at 251; Schillitani v. United States, 384 U.S. 364, 370-371 (1966).

27. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911).

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WEITNAUER TRADING,
Plaintiff- Judgement Creditor- Appellee,

- against -

MORTON L. ANNIS,
Defendant- Judgment Debtor- Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele *being duly sworn depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 W. 146th St., New York, N.Y.

That on the **15th** *day of* **Janury** *19* **76** *at* **95 Park Avenue, N.Y, N.Y.**

deponent served the annexed **BRIEF** *upon* **RICH KRINSKY POSES & KATZ**

the **Attorney** *in this action by delivering* 2 3 *a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

Sworn to before me, this **15th**
day of **January** *19* **76**

Robert T. Brin

ROBERT T. BRIN
Notary Public, State of New York
Qualified in New York County
Commission Expires March 30, 1977

James A. Steele
JAMES A. STEELE